1990

The State of Utah v. Jose Richard Quintana : Brief of Appellant

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Attorney for Appellee.
Connie L. Mower; Attorney at Law; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JOSE RICHARD QUINTANA,	:	Case No. 900264-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE DENIAL OF DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA TO THE CHARGE OF ATTEMPTED AGGRAVATED ROBBERY, A SECOND DEGREE FELONY, BY THE HONORABLE LEONARD H. RUSSON, JUDGE OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Connie L. Mower
Attorney at Law
623 East 100 South
Salt Lake City, Utah 84102
Telephone: (801) 363-9345

Attorney for Appellant

R. Paul Van Dam
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Appellee

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623 East 100 South
Salt Lake City, Utah 84102
Telephone: (801) 363-9345

Attorney for Appellant

R. Paul Van Dam
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND ORDINANCES

§76-3-203(2), Utah Code Annotated

Felony conviction -- Increase of sentence if firearm used

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years, but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

§76-6-302, Utah Code Annotated

Aggravated robbery

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in §76-1-601; or

(b) causes serious bodily injury upon another.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

§76-8-1001, Utah Code Annotated

Habitual criminal -- Determination

Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been

a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

§76-10-503, Utah Code Annotated

Possession of a dangerous weapon -- Persons not permitted to have -- Provisions for aliens -- Penalties

(1)(a) Any person who is not either a citizen of the United States or a lawfully admitted alien whose business, occupation, or duties require the use of a dangerous weapon; or any person who has been convicted of any crime of violence under the laws of the United States, the state, or any other state, government, or country, or who is addicted to the use of any narcotic drug, or who has been declared mentally incompetent may not own or have in his possession or under his custody or control any dangerous weapon as defined in this part. The Department of Public Safety shall adopt rules governing the issuance and use of special hunting permits for lawfully admitted aliens.

(b) Any person who violates this section is guilty of a class A misdemeanor, and if the dangerous weapon is a firearm or sawed-off shotgun, he is guilty of a third degree felony.

(2)(a) Any person who is on parole or probation for a felony or is incarcerated in a correctional facility may not have in his possession or under his custody or control any dangerous weapon as defined in this part.

(b) Any person who violates this section is guilty of a third degree felony, but if the dangerous weapon is a firearm, explosive, or infernal machine he is guilty of a second degree felony.

Rule 11(5), Utah Rules of Criminal Procedure

(5) The court may refuse to accept a plea of guilty or no contest, and may not accept the plea until the court has found:

(a) if the defendant is not represented by counsel, he has knowingly waived his right to counsel and does not desire counsel;

(b) the plea is voluntarily made;

(c) the defendant knows he has rights against compulsory self-incrimination, to a jury trial, and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;

(d) the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;

(e) the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(f) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached; and

(g) the defendant has been advised of the time limits for filing any motion to withdraw a plea of guilty or no contest.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JOSE RICHARD QUINTANA,	:	Case No. 900264-CA
	:	Priority No. 2
Defendant/Appellant.	:	

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by §78-2A-3(2)(f), Utah Code Annotated. The Court of Appeals has jurisdiction over "appeals from district court in criminal cases, except those involving a conviction of a First Degree Felony."

STATEMENT OF THE ISSUES

Did the trial court err in accepting defendant's guilty plea by failing to comply with Rule 11(5)(c) of the Utah Rules of Criminal Procedure which requires the court to review defendant's constitutional rights?

Did the trial court likewise fail to advise defendant, as required by Rule 11(5)(e), that the sentence for the Firearm Enhancement could be imposed consecutively with the sentence for the Attempted Aggravated Robbery?

Did the trial court fail to advise defendant, as required by Rule 11(5)(e) that his sentence for Attempted Aggravated Robbery

plus Firearm Enhancement could be run consecutively with the sentence he was already serving?

STATEMENT OF THE CASE

Defendant was charged, by Amended Information filed on December 29, 1987, with three (3) counts: Aggravated Robbery, a First Degree Felony, in violation of §76-6-302, Utah Code Annotated (1953, as amended); Possession of a Dangerous Weapon by a Restricted Person, a Second Degree Felony, in violation of §76-10-503, Utah Code Annotated (1953, as amended); and under the Habitual Criminal provisions of §76-8-1001, Utah Code Annotated (1953, as amended). (R. 19-21.) Defendant waived his right to Preliminary Hearing with the State's consent. On January 14, 1988, defendant was bound over to the Third Judicial District Court for trial. (R. 4.)

On March 21, 1988, defendant moved to withdraw his previously entered plea of not guilty in exchange for reduced charges. (T. 3/21/88, p. 1.) According to the plea bargain agreement, defendant would plead guilty to Attempted Aggravated Robbery, a Second Degree Felony with Firearm Enhancement, and, in exchange, the State would move to dismiss Counts II and III of the Information. (T. 3/21/88, p. 1.) The trial court accepted defendant's guilty plea to Attempted Aggravated Robbery and dismissed Counts II and III. (T. 3/21/88, p. 4.)

After entering his plea, defendant waived the two (2)

day minimum time for sentencing and was sentenced immediately. (T. 3/21/88, p. 5.) The State recommended that defendant serve a term of one (1) to fifteen (15) years consecutively to the sentence he was already serving. Additionally, the State argued for an additional sentence of one (1) year for Use of a Firearm, pursuant to §76-3-203(2). (T.3/21/88, p. 5-6.) Defendant requested that he serve a term of one (1) to fifteen (15) years concurrently with his previous commitment. (T. 3/21/88, p. 4.)

The trial court sentenced defendant to a term of one (1) to fifteen (15) years in the Utah State Prison to be served consecutively with defendant's previous commitment. (T. 3/21/88, p. 9.) The trial court also sentenced defendant to an additional term of one (1) year as enhancement for the use of a firearm to be served consecutively with the other two (2) sentences. (T 3/21/88, p. 9.)

Defendant filed a Motion to Withdraw Guilty Plea on August 7, 1989. (R. 41.) Defendant's original counsel moved to withdraw and the Third Judicial District Court granted the motion. (R. 37-40.) New counsel was appointed for defendant. On February 2, 1990, the Honorable Leonard H. Russon heard defendant's Motion to Withdraw Guilty Plea. Defendant argued that the court should allow him to withdraw his plea because the trial court failed to comply with Rule 11(5) of the Utah Rules of Criminal Procedure. (T. 2/2/90, p. 25.) Specifically, defendant argued that he had not been advised of his constitutional rights

and did not understand that the firearm count could be imposed consecutively with his other sentences. (T. 2/2/90, p. 42-43.) Defendant also argued that his guilty plea was involuntary because the court failed to advise him that he might be required to serve his new sentence consecutively with the sentence he was already serving. (T. 2/2/90, p. 25.)

In response, the State asserted that defendant signed an affidavit before entering his plea which enumerated defendant's constitutional rights as required by Rule 11(5)(c). (T. 2/2/90, p. 48.) The affidavit also stated that defendant's sentence was subject to enhancement for the use of a firearm. (T. 2/2/90, p. 30.) The State argued that this notice of enhancement in the affidavit complied with the requirement in Rule 11(5)(e) that defendant know of "the possibility of the imposition of consecutive sentences." (T. 2/2/90, p. 29-30.) The State also argued that the court was not required to advise defendant that his sentence may run consecutively with his previous commitment. (T. 2/2/90, p. 31-32.)

The lower court denied defendant's Motion to Withdraw Guilty Plea. The lower court held that defendant's affidavit sufficiently advised him of his constitutional rights; that defendant understood, by the word "enhancement," that his firearm sentence could be imposed consecutively; and that the court was not required to inform him that his new sentence could be imposed consecutively with the sentence he was already serving. (T.

2/2/90, p. 49-57.) See also (R. 55-57). On May 17, 1990, counsel for defendant filed a Notice of Appeal. (R. 58.)

STATEMENT OF THE FACTS

Due to the fact that this case was not tried, there is no other evidence to cite in support of a statement of the facts. Additional facts concerning the trial court are presented in the Argument section of this Brief, as those facts relate to the issues raised.

SUMMARY OF ARGUMENT

In State v. Gibbons, 740 P.d 1309 (Utah, 1987), the Utah Supreme Court adopted a strict compliance standard in accepting a defendant's guilty plea. It held that the trial court must strictly comply with Rule 11(5) of the Utah Rules of Criminal Procedure by making an on-the-record showing that the defendant knowingly and voluntarily waived his rights under the Constitution. The Utah Supreme Court also held that the use of a written affidavit cannot alone achieve compliance with Rule 11(5). The trial court must personally apprise the defendant of his rights on the record prior to the entry of the guilty plea before a knowing and voluntary plea may be entered.

In State v. Valencia, 776 P.2d 1332 (Utah App., 1989), the Utah Court of Appeals held that compliance with Rule 11(5) mandates that a defendant be advised of his specific

constitutional rights: The right against self-incrimination, to a jury, to appeal, and to confront witnesses. The Court of Appeals also held that Rule 11(5) mandates that a defendant be informed of the maximum possible sentence for the offense, including the possibility of consecutive sentences. In State v. Smith, 777 P.2d 464, 466 (Utah, 1989), the Utah Supreme Court held that the defendant must be "unequivocally and clearly informed about the sentence that would be imposed."

In the case at bar, the trial court failed to advise defendant of his specific constitutional rights. The trial court also failed to clearly and unequivocally advise defendant that his firearm enhancement and the sentence he was already serving might be imposed consecutively. Therefore, the trial court failed to comply with Rule 11(5) and defendant should be allowed to withdraw his guilty plea.

ARGUMENT

I

THE TRIAL COURT FAILED TO COMPLY WITH THE STRICT STANDARDS OF RULE 11(5) OF THE UTAH RULES OF CRIMINAL PROCEDURE IN ACCEPTING DEFENDANT'S GUILTY PLEA

Rule 11(5) of the Utah Rules of Criminal Procedure provides, in pertinent part:

> (5) The court may refuse to accept a plea of guilty or no contest and may not accept the plea until the court has found:
>
> (b) the plea is voluntarily made;
>
> (c) the defendant knows he has rights against compulsory self-incrimination, to a jury trial, and to confront and

> cross-examine witnesses against him, and that by entering the plea, he waives all of those rights;...
> (e) the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;...

In State v. Gibbons, 740 P.2d 1309 (Utah, 1987), the Utah Supreme Court held: "Rule 11(5)(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(5)(e) requirements are complied with when a guilty plea is entered." Id. at 1312.

Further, the Utah Supreme Court held that a trial court may not rely on a written affidavit to ensure that these requirements are met. "The use of a sufficient affidavit can promote efficiency, but an affidavit should be only the starting point, not an end point, in the pleading process." 740 P.2d at 1313. The Court imposed an affirmative duty on the part of the trial judge to review the affidavit with the defendant. "The trial judge should then review the statements in the affidavit with the defendant, question the defendant concerning his understanding of it, and fulfill the other requirements imposed by §77-35-11 on the record before accepting the guilty plea." 740 P.2d at 1314.

In Gibbons, the Utah Supreme Court abandoned the former "record as a whole" test. See Warner v. Morris, 709 P.2d 309 (Utah, 1985); Brooks v. Morris, 709 P.2d 311 (Utah, 1985);

Jolivet v. Cook, 784 P.2d 1148 (Utah, 1989). (Guilty plea entered before Utah Supreme Court decided Gibbons).[1]

Likewise, the Utah Court of Appeals has followed the strict compliance standard of Gibbons. In State v. Valencia, 776 P.2d 1332, 1334 (Utah App. 1989), the Court held "[s]trict, and not just substantial, compliance with [Rule 11(5)] is required."

Similarly, in State v. Pharris, 143 Utah Adv. Rep. 35 (1990), the Utah Court of Appeals considered the voluntariness of defendant's guilty plea and the trial court's compliance with Rule 11(5).[2] It held that the trial court could not just rely on defendant's written affidavit to ensure that the plea was voluntary and in compliance with Rule 11(5). 143 Utah Adv. Rep. at 37.

Additionally, the Utah Court of Appeals held in Valencia that the examination of the defendant regarding his affidavit "should be sufficiently detailed and extensive to provide a factual basis to conclude from defendant's responses that his decision was knowing and voluntary." 776 P.2d at 1335.

---

[1] State v. Vasilacopulos, 756 P.2d 92, 94 (Utah App. 1988), "when a new rule of criminal procedure constitutes a clear break with the past, it will not be applied retroactively."

[2] The Utah Court of Appeals recently upheld its decision in Pharris that a trial court must strictly comply with Rule 11 in accepting a guilty plea. See State v. Maguire, Case No. 900045-CA (filed 11/16/90).

A. THE TRIAL COURT FAILED TO ENUMERATE DEFENDANT'S CONSTITUTIONAL RIGHTS IN ACCEPTING HIS PLEA

In determining whether defendant knowingly and voluntarily waived his constitutional rights, the trial court asked the following:

> THE COURT: You understand that you have certain rights under the constitution and if you plead guilty here today, that you are waiving those rights
>
> MR QUINTANA: Yes
>
> (T. 3/21/88, p. 1-2)

The trial court's inquiry failed to comply with the strict requirements of Rule 11(5). In Valencia, the Court of Appeals held that general questions regarding a defendant's constitutional rights are insufficient. "Specific inquiry should be made as to whether defendant understands that by his plea he waives his rights against self-incrimination, to a jury trial, to appeal, and to confront witnesses." [Emphasis added.] 776 P.2d at 1335.

Likewise, in Pharris, the Court of Appeals held:

> [T]he trial court did not as required by Rule 11(5)(c) inform defendant at the time the plea was taken that he waived his constitutional right against self-incrimination by pleading guilty to the offense. The State argues that this information is included in the affidavit. However, inclusion in the affidavit alone is not sufficient to ensure that the defendant's constitutional rights are protected. 143 Utah Adv. Rep. at 37.

Because the trial court failed to make a specific

inquiry regarding defendant's constitutional rights as required by Rule 11(5), defendant should be allowed to withdraw his guilty plea.

B. THE TRIAL COURT FAILED TO ADVISE DEFENDANT THAT HE COULD BE SENTENCED CONSECUTIVELY FOR FIREARM ENHANCEMENT

The trial court failed to inform defendant that he might have to serve a consecutive sentence for the use of a firearm. Because defendant was not properly informed, his guilty plea was not knowing and voluntary. The trial court advised the defendant as follows:

> THE COURT: You also understand that there could be an enhancement of zero to five years because you used a firearm or a gun at the time of the attempted robbery
>
> MR QUINTANA: Yes
>
> (T. 3/21/88, p. 3)

Never did the trial court make a specific inquiry into whether defendant knew that enhancement meant a possibility of consecutive sentences. The language of Rule 11(5)(e) is clear.

> The court may refuse to accept a plea of guilty or no contest, and may not accept the plea until the court has found:
>
> (e) the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences. [Emphasis added.]

In State v. Copeland, 765 P.2d 1266 (Utah, 1988), the

Utah Supreme Court made it clear that a trial court must show on the record that a defendant's plea is knowing and voluntary.

> [T]here is no adequate substitute for demonstrating in the record at the time the plea is entered for the defendant's understanding of the nature of the charge against him." McCarthy, 394 U.S. at 470, ...We think the most effective way to do this is to have a defendant state in his own words his understanding of the offense and the action which make him guilty of the offense. Id. at 1273.

In State v. Smith, 777 P.2d 464 (Utah, 1989), the Utah Supreme Court held that adequate knowledge is crucial for a plea to be voluntary: "[t]he record must show that [defendant] was unequivocally and clearly informed about the sentence that would be imposed." [Emphasis added.] Id. at 466.

In the instant case, defendant was not unequivocally and clearly informed that his firearm enhancement might be imposed consecutively. While the lower court did inform defendant of the enhancement charge, the record does not show that defendant understood that it could be imposed consecutively. The failure to clearly inform defendant that enhancement might mean imposition of a consecutive sentence rendered his plea unknowing and involuntary.

Likewise in Vasilacopulos, the Utah Court of Appeals rejected the State's contention that the trial court adequately informed the defendant of the possibility of consecutive sentences. In that case, the Court examined the trial court's inadequate phraseology under the weaker "record as a whole test"

and concluded:

> The record as a whole supports a conclusion that defendant would only be subject to consecutive sentences under certain conditions. Paragraph 7 of defendant's affidavit states, "I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed on me. 756 P.2d at 95.

From this statement, the Court concluded that "[t]he record as a whole did not affirmatively establish defendant's full knowledge and understanding of the consequences of his plea under Rule 11(5)(e)."[3]

C. THE TRIAL COURT FAILED TO ADVISE DEFENDANT THAT HE COULD BE SENTENCED CONSECUTIVELY WITH THE SENTENCE HE WAS ALREADY SERVING

As previously noted, under Smith, the trial court is required to show that a defendant is unequivocally and clearly informed about the sentence which might be imposed. Smith, 777 P.2d at 466. In the case at bar, defendant was never informed that he might have to serve his sentence consecutively with the sentence he was already serving. (T. 3/21/88, p. 1-4)

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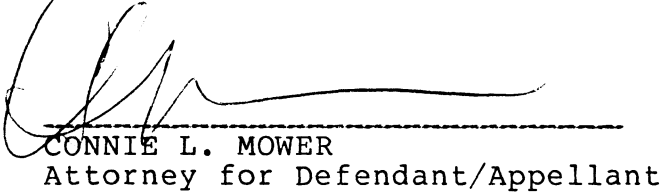
[3] The Utah Court of Appeals in Pharris, 143 Utah Adv. Rep. at 39 n.12, also rejected an inadequately phrased warning of defendant's allowable sentence. In Pharris, the defendant's allowable sentence was listed as: "Theft, 3rd Degree, 0-5" under notation: "Crime, Degree, Punishment." However, the Court specifically noted that the listing did not contain "years" following "0-5."

Therefore, the trial court failed to comply with Rule 11(5) which mandates that the defendant be informed "of the possibility of the imposition of consecutive sentences." Rule 11(5)(e) Utah Rules of Criminal Procedure.

CONCLUSION

Defendant asks this Court to remand this case to the trial court with an order to allow defendant to withdraw his previously entered guilty plea.

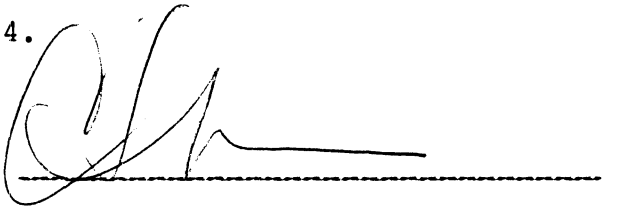
RESPECTFULLY SUBMITTED this 15th day of January, 1991.



CONNIE L. MOWER
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 1991, I caused to be delivered four (4) true and correct copies of the foregoing BRIEF OF APPELLANT to the attorney for the plaintiff/appellee herein, Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114.



ADDENDUM 1

(Affidavit of Defendant, March 21, 1988)

In the District Court of the Third Judicial District
State of Utah

MAR 21 1988

H Dixon Hindley, Clerk of District Court
By D Sundberg
Deputy Clerk

THE STATE OF UTAH,
Plaintiff

vs.

Jose Quintana
Defendant

Affidavit of Defendant

Criminal No. 88-127

I, Jose Quintana, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of:

Attempted Aggravated Robbery
(Name of Crime)

Elements:	Facts:
Def. attempted by use of force or fear to take property from the person of an employee of Maverick Store and used a deadly weapon, to-wit: gun.	Def. attempted to take property from employee of Maverick Store and used a gun.

I have received a copy of the charge (Information) and understand the crime I am pleading guilty to is a Second Degree Felony
(Degree of Felony or Class of Misdemeanor)

and understand the punishment for this crime may be 1-15 years + enhancement 0-5 prison term, $10,000 and 35% surcharge fine, or both. I am not on drugs or alcohol.

My plea of guilty is freely and voluntarily made. I am represented by Attorney James M. Bell who has explained my rights to me and I understand them.

1. I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.

2. I know that if I wish to have a trial I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.

3. I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.

4. I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.

5. I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.

6. I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the preceeding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered.

7. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty

or sentence or imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be.

9. No promises or threats of any kind have been made to induce me to plead guilty. The following other charges pending against me, to-wit: (Court case number(s) or count(s)):

Court II, III.

will be dismissed, and that no other charge(s) will be filed against me for other crimes I may have committed which are now known to the prosecuting attorney. I am also aware that any charge or sentencing concessions or recommendations or probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or counsel for the State, is not binding on the Judge and may not be approved by the Judge.

10. I have read this Affidavit, or I have had it read to me by my attorney, and I know and understand its contents. I am 35 years of age, have attended school through the high school and I can read and understand the English language.

Dated this 21 day of March, 1988.

Joe Richard Quintana
Defendant

Subscribed and sworn to before me in Court this 21st day of March, 1988

ATTEST
H. DIXON HINDLEY
Clerk
By L L Lundberg
Deputy Clerk

Leonard H Russon
Judge

CERTIFICATE OF DEFENSE ATTORNEY:

I certify that I am the attorney for Joe Quintana, the defendant named above and I know he has read the Affidavit, or that I have read it to him, and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing Affidavit are in all respects accurate and true.

Defense Attorney

CERTIFICATE OF PROSECUTING ATTORNEY:

I certify that I am the attorney for the State of Utah in its case against Joe Quintana, defendant. I have reviewed the Affidavit of the defendant and find that the declarations are true and accurate. No improper inducements, threats, or coercions to encourage a plea have been offered the defendant. There is reasonable cause to believe the evidence would support the conviction of the defendant for the plea offered, and that acceptance of the plea would serve the public interest.

Karen Knight-Cagan
Prosecuting Attorney

ORDER

Based upon the facts set forth in the foregoing Affidavit and certification, the Court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "Guilty" to the charge, set forth in the Affidavit be accepted and entered.

Done in Court this 21st day of March, 1988.

ATTEST
H. DIXON HINDLEY
Clerk

Leonard H Russon
District Judge

ADDENDUM 2

(Disposition Hearing, March 21, 1988)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH Plaintiff, vs. JOSE RICHARD QUINTANA Defendant.	Transcript of: Disposition (Pages 1-9) Defendant's Motion to withdraw Guilty Plea (Pages 10-20/21-59) Case No. CR88-127

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Leonard H. Russon, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Monday, March 21, 1988.

APPEARANCES

For the State: KAREN KNIGHT-EAGAN
Deputy County Attorney
231 East 4th South
Salt Lake City, Utah

For the Defendant: FRANCES PALACIOS
Attorney at Law
623 East 100 South
Salt Lake City, Utah

MONDAY, MARCH 21, 1988

P R O C E E D I N G S

THE COURT: This is the time set for disposition in the case of State of Utah vs. Quintana CR88-127. This time was set for disposition. What is the status of this case?

MS. PALACIOS: Your Honor, today we are prepared to move to withdraw our previously entered plea of not guilty to count 1 of the Information and enter a plea to an Attempted Aggravated Robbery, which would constitute a second degree felony, keeping in that felony the enhancement provisions of the aggravation.

In exchange for that plea, the State would move to dismiss count 2 and I believe count 3, in the amended information, is the habitual criminal and also move to dismiss that count as well.

MS. KNIGHT-EAGAN: That is correct, Your Honor. I would move to dismiss count 1 to reflect the charge of Attempted Aggravated Robbery, second degree felony, but remain included in that paragraph is the firearm enhancement.

THE COURT: Mr. Quintana, have you discussed this with your attorney?

MR. QUINTANA: Yes, I have.

THE COURT: You understand you have certain

rights under the constitution and if you plead guilty here today, that you are waiving those rights?

MR. QUINTANA: Yes.

THE COURT: An affidavit has been prepared and have you read that affidavit?

MR. QUINTANA: Yes.

THE COURT: Have you reviewed that with your attorney?

MR. QUINTANA: Yes.

THE COURT: Were there any words or phrases or sentences in the affidavit you did not understand?

MR. QUINTANA: No.

THE COURT: Are you under the influence at the present time of any drugs or medication that would impair your good judgment?

MR. QUINTANA: No.

THE COURT: Would you go ahead, please, and sign your affidavit.

MS. KNIGHT-EAGAN: Your Honor, I have signed it.

MS. PALACIOS: Your Honor, I have signed it on behalf of Mr. Quintana and Karen Knight-Eagan has signed it on behalf of the State.

THE COURT: Mr. Quintana, for one to be found guilty of Attempted Aggravated Robbery or to plead guilty

to that crime, one has to have attempted by force or fear to take the property from another person and to do so with a deadly weapon, in this case a gun. You understand those to be the elements of the crime?

MR. QUINTANA: Yes.

THE COURT: This affidavit says that you attempted to take property from an employee of the Magic Store and you did so with the use of a gun; is that what happened?

MR. QUINTANA: Yes.

THE COURT: And is that why you are going to plead guilty here today to Attempted Aggravated Robbery?

MR. QUINTANA: Yes.

THE COURT: You understand that this particular crime to which you will be pleading is a second degree felony and carries a possible sentence in the State Prison of one to fifteen years?

MR. QUINTANA: Yes, I do.

THE COURT: You also understand that there could be an enhancement of zero to five years because you used a firearm or a gun at the time of the attempted aggravated robbery?

MR. QUINTANA: Yes.

THE COURT: Have any promises or threats been made to you to induce you to make this guilty plea today?

MR. QUINTANA: No.

THE COURT: Knowing all that we have talked about, is it still your desire to plead guilty to this particular crime?

MR. QUINTANA: Yes.

THE COURT: To the crime, then, to count 1 of the amended Information as amended, Attempted Aggravated Robbery, a second degree felony, do you plead guilty or not guilty?

MR. QUINTANA: Guilty.

THE COURT: The Court finds that the defendant has freely and voluntarily made a guilty plea to count 1 as amended and accepts that guilty plea. And do I have a motion as to counts 2 and 3?

MS. KNIGHT-EAGAN: We move to dismiss, Your Honor.

THE COURT: The said counts are hereby dismissed. What about a date for sentencing?

MS. PALACIOS: Your Honor, I have discussed this matter with Mr. Quintana and I suppose I would ask the Court to consider allowing Mr. Quintana to be sentenced today and allow the sentence with respect to the one to fifteen, to run concurrently with what he is serving. I do have some background information.

THE COURT: First of all, let's just consider

whether or not we should sentence today.

Mr. Quintana, by statute in this State, I am not supposed to sentence you for at least two days from today and within 30 days. However, this is something that you can waive, if you want. If you desire to be sentenced today, you do so without the benefit of a Presentence Report and we can do that. That is something you have to agree to. Do you, in fact, agree to that?

MR. QUINTANA: I might as well do it today.

THE COURT: Do you, in fact, then waive the statutory right you have not to be sentenced within two days of taking the plea?

MR. QUINTANA: Yes.

THE COURT: Does the State have a recommendation at this time?

MS. KNIGHT-EAGAN: Your Honor, it would seem appropriate since Mr. Quintana is already at the prison to commit him for the additional one to fifteen-year term. The State's request is going to be that that run consecutively to his present commitment since it is an entirely separate criminal episode and crime.

In addition, the sentencing on the enhancement is covered in 76-2-302 (sub. 2) it requires a minimum sentence to add a consecutive year.

THE COURT: As for the enhancement zero to

five?

MS. KNIGHT-EAGAN: The minimum required by the statute would be one year consecutively. It allows the Court to provide for an indeterminate zero to five and run it consecutively.

MS. PALACIOS: I have a copy for the Court, Your Honor.

THE COURT: When it comes to enhancement, do I do that zero to five like any indeterminate sentence, or do I choose a number of years between zero to five?

MS. PALACIOS: My understanding, the Court makes at least a one-year sentence. But after that the Court may make it for more. We would request the Court to impose the one-year statutory time since it does need to run consecutively.

If I can give the Court some background with respect to Mr. Quintana, Mr. Quintana has a 1971 burglary conviction. It shows as a second degree felony, however, the reports that I have gathered and Mr. Quintana tells me that was a burglary of a drug store. It was at night. At that time a burglary at night was considered a second degree. So, it was not a burglary of a dwelling. He has two other prior convictions for burglary and a theft which is zero to five, which occurred at the same time which has to do with the burglary and theft from a drug

store. And that basically, Your Honor, explains Mr. Quintana's situation.

He has had a longstanding drug problem. While committing this particular offense, he was under the influence of alcohol and drugs. And in a review of the police report, it is quite clear that Mr. Quintana was so intoxicated that he didn't know what he was doing. We are not saying there was no legal responsibility. He did such a terrible job, he did this robbery while he was wearing a hat that said "Daryl" on it. He barely left the place and the police picked him up. This is not something he does plan out and does well. It was a result of a need for his drugs, he became involved.

Because of that, when he returns to the prison we are going to ask the Parole Board to consider some treatment for him before he is released. He was paroled in 1973 and remained out until 1985, and I think that indicates there is a long period of time that he was on the street where he could perform the drugs that overcame him again.

Mr. Quintana, while the record reflects a number of DUI's, does not have a history of robberies or assaultive-type crimes as this, and Mr. Quintana has indicated to me he is real concerned because he did commit this type of crime and this is not something that

he, as a person, who is not intoxicated, would have even considered doing.

We will ask the Court to consider he is before the Board now on two zero to fives. If the Court intends to run this consecutively, we would ask the Court to also consider to only sentence him on the one year for the enhancement.

You have anything you want to add?

MR. QUINTANA: You have said it all.

THE COURT: Anything from the State?

MS. KNIGHT-EAGAN: Nothing additional, Your Honor.

THE COURT: Were you on parole at the time of this crime?

MR. QUINTANA: Yes.

THE COURT: Is there any legal reason why sentence should not be imposed at this time?

MS. PALACIOS: No legal reason, Your Honor.

THE COURT: Mr. Quintana, the Court is always concerned about parolees, who commit crimes while on parole, and what to do with them when they commit a crime. Because if one gets out of the prison on parole, he is supposed to be on his best behavior. If he commits other crimes and go back and the sentence is concurrent again, what is the real incentive to go straight and to

obey the law? That is the first problem we have.

The second thing, with this case we are always concerned about guns that are used. According to the Information, the manager, whoever was there at the store, was ordered to lie on the floor and the terrifying thought was going through their minds of whether or not they are going to be shot and killed any minute, because it is in the paper everyday and those few moments of absolute terror for people are things that a Judge has to also take into consideration. I think this is a case that I have to make the sentence consecutive, and I am going to do that.

It is the judgment and sentence of this Court that you, Jose Quintana, be sentenced to a term of one to fifteen years in the Utah State Prison for the crime of Attempted Aggravated Robbery. That sentence is to run consecutively to any sentence you are presently serving in that prison. And in addition to that, I am sentencing you to an enhancement of one year for attempting to commit this crime with the use of a firearm. That enhancement of one year will likewise be consecutive and commitment forthwith.

(End of hearing.)

* * * * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the Official Court Reporters of the Third District Court of the State of Utah.

That on Monday, March 21, 1988, I reported the testimony and proceedings, to the best of my ability on said date in the above-entitled matter, presided over by the Honorable Leonard H. Russon in the Third District Court of Salt Lake County, State of Utah; and that the foregoing pages, numbered from 1 to 9, inclusive, contain a full, true and correct account of said proceedings of Quintana Disposition to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this 23rd day of October, 1990.

Dorothy L. Tripp

Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No. 00074-1801-8

ADDENDUM 3

(Defendant's Motion to Withdraw Guilty Plea,
1/30/90 and 2/2/90)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH Plaintiff, vs. JOSE RICHARD QUINTANA Defendant.	Transcript of: Defendant's Motion to withdraw Guilty Plea (Pages 10-20) Case No. CR88-127

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Leonard H. Russon, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Tuesday, January 30, 1990.

APPEARANCES

For the State: BARBARA BYRNE
Deputy County Attorney
231 East 4th South
Salt Lake City, Utah

For the Defendant: CONNIE L. MOWER
Attorney at Law
623 East 100 South
Salt Lake City, Utah

TUESDAY, JANUARY 30, 1990

PROCEEDINGS

THE COURT: This is the time for hearing in State of Utah vs. Quintana, CR88-127. Would you identify yourselves and who you are representing.

VOICE: Your Honor, Connie Mower with the defendant who is present.

VOICE: Barbara Byrne representing the State.

THE COURT: And the record should show the defendant is present here in court and this is the defense's motion. And you may proceed.

MS. BYRNE: Your Honor, before the defense proceeds with the motion, Ms. Mower has shown me her delivery of the notice of this and I wouldn't question for a moment that she sent notice of this. I did not receive notice of it until yesterday afternoon at 4:00. This morning I have received a copy of the transcript, the copy of the affidavit and copy of the cases. The State is not prepared to argue this at this time. Our notice came from the Court yesterday afternoon and that is the first we had heard of it. So I would ask that it be continued for the State to have an opportunity to prepare argument on it.

THE COURT: Ms. Mower.

MS. MOWER: Your Honor, back in August of 1989

when I was first appointed to represent Mr. Quintana, I filed in open court, I believe, his Motion to Withdraw his Guilty Plea subject to being noticed up once we had received the transcript of the change of plea that was had before Your Honor back in March of 1988. I did make a request for that transcript and received it towards the end of October and subsequently noticed up this hearing after doing the research on the matter.

I filed back in December a Notice of Hearing. My copy which is conformed, it is not an exact copy, shows that I signed it on December the 14th and that such a copy of this was mailed to the County Attorney's Office back in December. We are prepared today and ready to proceed on the issues.

The argument today will be as to issues as a matter of law whether or not the Court should permit withdrawal of his guilty plea based upon the record as it currently exists. We are prepared to proceed and we believe we have given notice.

THE COURT: Well, I will give you some time, Ms. Byrne, to look over -- Have you read the transcript?

MS. BYRNE: No, Your Honor, as I said, I just received the transcript this morning which Ms. Mower was polite to provide to me. I have been in Judge Rigtrup's court in a Pretrial Conference since that time and have

not had a opportunity to read through it.

THE COURT: I will proceed with this hearing at this time. Let you make your arguments at this time and see where we stand on it and grant you additional time if necessary, Ms. Byrne, to make a further response if I have to continue the hearing; but he is here from the prison, and we might as well.

It would appear from the file that notice was given in December of this hearing. That's more than 30 days away and there is a mailing certificate. If it got lost someplace, we confront that once in awhile. I think at this point I have no choice but to proceed and you may proceed.

MS. BYRNE: Your Honor, just for the record, I am not questioning that Ms. Mower sent it. I am merely stating that in point of strict fact I never got it. That is the point I want to make.

THE COURT: Okay.

MS. MOWER: Your Honor, before I proceed with my argument today, I would like to hand the Court the original of the transcript which was prepared by your Court Reporter, if I may approach. And further, I would give the Court a copy of Rule 11 as it currently appears in the cocoa version of the Utah Code and I will make an explanation because there is some new language in there.

In addition to that, I will give the Court copies of the Gibbons and Vasilacopulos cases.

THE COURT: Let me read this transcript. If you had given it to me earlier, I would have had it read before now.

MS. MOWER: I should have, because I was here earlier.

(Pause)

THE COURT: Okay, I have read the transcript of the sentencing hearing that occurred on March 21, 1988.

MS. MOWER: That includes the change of plea.

THE COURT: That's with the change of plea. I meant the change of plea, right.

MS. MOWER: I have also brought with me today a copy of Rule 11 and the Gibbons and Vasilacopulos cases, which I believe are dispositive.

(Pause)

THE COURT: Okay, I have read. Ms. Byrne, have you read this authority that she has handed to the Court? I know you are on a short leash here.

MS. BYRNE: Your Honor, unfortunately I am not quite as fast as you are. I am still struggling through the transcript.

THE COURT: Go ahead and read the transcript.

(Pause)

What I am going to do at this point is just take an informal recess and allow Ms. Byrne, so she doesn't feel rushed, to read the transcript and this case authority and we will see where we stand at that point. As I indicated, the State has indicated they don't question that notice was probably given, but she has not received notice and she is not really prepared to go forward and that is unfair on one side or the other for the Court to rule with that being the case. If she feels satisfied arguing this case after her review of the transcript and this authority, then we'll go ahead and argue it today. If she doesn't, then we will just continue this hearing until tomorrow or whatever.

MS. BYRNE: Tomorrow would be fine.

THE COURT: I can fit you in tomorrow morning again.

MS. MOWER: I have a jury in West Valley, Your Honor, beginning at 9:00. It will be a day and a half.

MS. BYRNE: Your Honor, I think if I have a few minutes to read this over, I can probably respond in a defensive manner, I guess, to what counsel has presented. I am, however, aware of other case law on this copy but not being Kent Morgan, I cannot cite the Court the names or citations.

THE COURT: You don't look like Kent Morgan.

MS. BYRNE: I am one of those that keep fact situations in my head and occasionally holdings, but I can't do names or cites. It is not part of my repertoire.

THE COURT: Let me ask, Ms. Mower, at this point, is it your position that the defendant was not advised that the sentence could be a consecutive sentence?

MS. MOWER: Yes, there are two critical problems with the transcript. The first issue is with regard to the waiver of rights, and a question whether the Court complied with Rule 11(e) in making sure on the record the defendant knew or understood his various rights which he waived, those rights which, of course, are contained in the affidavit. That is question No. 1.

Question No. 2, was whether the Court properly advised him that there would be a consecutive sentence, not only to the sentence that he was currently serving out at the Utah State Prison, but also the gun enhancement. Those are the two critical issues.

THE COURT: Okay. Now, with that in mind, let's stand in informal recess for about 20 minutes or 30 or 15, whatever it takes Ms. Byrne to review. Did she hand you copies of these cases?

MS. BYRNE: She did, Your Honor. I have the

two cases.

THE COURT: Or shall we continue this? It is too bad you are not available tomorrow morning.

MS. MOWER: I am sorry. I can't sit on this case the whole time tomorrow.

MS. BYRNE: Can I make an alternative suggestion, Your Honor?

THE COURT: Yes.

MS. BYRNE: I think by 2:00 this afternoon I could have the cases in hand and be prepared to argue. I can do it by probably 11, but I have to be at roll call in Circuit Court. Is there any chance we can do this this afternoon?

THE COURT: What is that?

TRANSPORTATION OFFICER: Judge, I am not sure of the transportation.

MS. MOWER: And, Judge, I am due in Ogden this afternoon at 2:00 on an Order to Show Cause calendar. Now, if that folds, I will be available.

THE COURT: This won't take long to argue. This is going to be a legal matter based upon this transcript. Based on the transcript and the affidavit, it is going to be a legal argument. It shouldn't take us more than --

MS. MOWER: Half hour?

THE COURT: At the most, both sides half hour.

MS. MOWER: I am long-winded.

MS. BYRNE: I think if I go over to Circuit Court, I can probably farm these cases to one of my teammates and say "do this for me," and I can go over to our library. There is one particular case that I need and I can be back here by 11.

THE COURT: I don't want to rush you. We can fit this in Friday morning if we have to. Oh, we can't.

THE CLERK: You can do it Friday afternoon at 1:30.

THE COURT: Okay, Friday afternoon at 1:30.

MS. BYRNE: That would be fine.

MS. MOWER: I think I am clear Friday afternoon and if not I guess I can make it clear.

THE COURT: Mr. Quintana can make it, I am sure. I don't want to put the rush on you that fast. I would have preferred tomorrow morning. Ms. Mower is in trial. Let's go for Friday afternoon at 1:30. So we will simply continue this hearing now until Friday afternoon at 1:30 and make sure he is transported in.

MS. MOWER: Your Honor, for the Court, I am aware of one other case that has been decided on the issue of a Motion to Withdraw a Guilty Plea which was handed down, I think, in the beginning of 1989. That is

the Copland case. As far as I know, it doesn't apply to our facts.

There is another case which I worked on an appeal, State of Utah vs. Kerry Ross Moore which resulted in no opinion being published, but simply a minute. If there are other cases, I would certainly be interested to know it.

MS. BYRNE: As soon as I find it, I will notify you.

Your Honor, one other matter for the record, before we adjourn. On page 4 of the transcript at line 19, I think there may be an error. It indicates Ms. Knight-Eagan is speaking and telling the Court "I have discussed this matter with Mr. Quintana."

THE COURT: What line, page 4?

MS. BYRNE: Page 4, line 19. It indicates the speaker to be Ms. Knight-Eagan. I would suggest to the Court that that is probably Ms. Palacios because if that were a statement by Ms. Knight-Eagan suggesting that the sentence run concurrently --

THE COURT: I am sure that that is a typographical error. I think you would agree.

MS. MOWER: I would agree that that is probably Ms. Palacios speaking at this point, and the State wouldn't have an interest in that. It would be the

defense at that point.

MS. BYRNE: I would be surprised if Ms. Knight-Eagan had been discussing the matter with Mr. Quintana when Ms. Palacios was there.

THE COURT: Yes. I am just going to write on this copy.

MS. MOWER: That is the original provided by your Court Reporter and maybe we will make that part of the record.

THE COURT: Okay, then continue until -- This incidentally, this sentencing took place prior to our adoption of the new statement that we have all finally put together, along with the County Attorney's Office and Public Defenders Office. It is kind of a joint effort to put together some sort of a statement that covered all of the bases. So, this does come under the old affidavit that was used for years and years and years. We will deal with this come Friday afternoon at 1:30.

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the Official Court Reporters of the Third District Court of the State of Utah.

That on Tuesday, January 30, 1990, I reported the testimony and proceedings, to the best of my ability on said date in the above-entitled matter, presided over by the Honorable Leonard H. Russon in the Third District Court of Salt Lake County, State of Utah; and that the foregoing pages, numbered from 10 to 20, inclusive, contain a full, true and correct account of said proceedings of Quintana's Motion to Withdraw Plea to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this 23rd day of October, 1990.

Dorothy L. Tripp

Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No. 00074-1801-8

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH Plaintiff, vs. JOSE RICHARD QUINTANA Defendant.	Transcript of: Defendant's Motion to withdraw Guilty Plea Continued (Pages 21-59) Case No. CR88-127

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Leonard H. Russon, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Friday, February 2, 1990.

APPEARANCES

For the State: BARBARA BYRNE
Deputy County Attorney
231 East 4th South
Salt Lake City, Utah

For the Defendant: CONNIE L. MOWER
Attorney at Law
623 East 100 South
Salt Lake City, Utah

FRIDAY, FEBRUARY 2, 1990 1:30 P.M.

PROCEEDINGS

THE COURT: This is the time for hearing in the continued hearing of State of Utah vs. Quintana, CR88-127. Identify yourselves and who you are representing.

MS. BYRNE: Barbara Byrne representing the State.

MS. MOWER: Connie Mower appearing with the defendant who is present in court.

THE COURT: The defendant is present and we have held one hearing in this matter. We continued it to give the State an opportunity to review the authorities submitted by the defendant and to review the transcript of the hearing at the which time the plea was taken. Now, Ms. Mower, anything further? You may proceed.

MS. MOWER: Thank you. Your Honor, we are here today on Defendant's Motion to set aside his previously entered plea of guilty in this case. Mr. Quintana was originally charged in the Information with the crimes of aggravated robbery, possession of a firearm by a restricted person, and habitual criminal, as I recall. A plea bargain was worked out between the parties in this case and by the record it would appear that on March 21, 1988, Mr. Quintana entered a plea of guilty to the charge of attempted aggravated robbery and Count 2, which would

have been the possession of a firearm by a restricted person, was dismissed, as well as the habitual criminal. At the time the Court took Mr. Quintana's plea, the Court did make use of an affidavit which was the old affidavit, and not the one that is currently in use by the Court. There was some discussion on the record and I have provided the Court with the affidavit. But to summarize what occurred at the time of the taking of the plea, counsel stated what the plea bargain was for the record. The Court asked Mr. Quintana if he had discussed the plea bargain with his attorney and he acknowledged he had. You asked him if he understood that he had certain rights and if he pled guilty he would be waiving the rights. You asked him if he saw the affidavit; if he read it; if he understood it. "Do you have any questions about it?" And you further asked him if he was under the influence of drugs or alcohol.

At that point the Court instructed Mr. Quintana to sign the affidavit entering his plea, I assume, and also waiving his rights under the affidavit. The Court then reviewed with Mr. Quintana, this is contained on pages 2 and 3, the elements of the offense and the factual basis for satisfying those elements. And Mr. Quintana, on the record, acknowledged that the facts did in fact satisfy the elements as set forth.

The critical portion of the affidavit comes up now. Beginning on page 3 of the transcript, the Court begins to describe what is the minimum and maximum punishment that could be imposed on Mr. Quintana and the Court begins about line 14: "You understand that this particular crime to which you are pleading is a second degree felony, which carries a possible sentence in prison of 1 to 15 years? MR. QUINTANA: Yes, I do. THE COURT: You also understand there could be an enhancement of 0 to 5 years because you used a firearm or a gun at the time of the attempted robbery? MR. QUINTANA: Yes."

The Court then asks if any promises or threats had been made and then asks Mr. Quintana if he wishes still to enter a plea of guilty, which in fact he does and that is reflected on the transcript, page 4, line 10.

The problem that we have with the entry of the plea, Your Honor, is that this plea was an involuntary plea and was not a knowing or intelligent plea. Based on the transcript, at the time of the taking of the plea and even taking into account the affidavit that was prepared, there were two problems. No. 1 problem, and the most significant problem, is that the Court does not advise Mr. Quintana on the record that there is a possibility that with the aggravated robbery charge, with gun enhancement, that the Court has the option of imposing 1

to 15 on the aggravated robbery and consecutively an additional 0 to 5 on the enhancement, gun enhancement portion of that crime.

It is significant in the transcript that there is no discussion of consecutive sentences until later on when the Court begins the sentencing process. And the first time I see it, the word even, "consecutive" comes in on page 5 when Ms. Knight-Eagan requests that he be sentenced consecutively to the case he was already on parole on, consecutive to the 1 to 15 aggravated robbery and the gun enhancement consecutive to that. That is the only reference in this transcript or the beginning reference, and I would ask the Court to note that is after the taking of the plea.

The Court is aware that under Rule 11(e) of the Utah Rules of Criminal Procedure that the Court is required, and absolutely required, to establish certain things on the record before the Court can accept a plea. And specifically in question here are in Rule 11(3)5, (e)5-C, and (e)5-E. The rule requires that the Court may refuse to take a plea of guilty or no contest and may not accept this plea until the Court has found (e) this portion: "The defendant knows the minimum and maximum sentences that may be imposed upon him for each offense to which a plea is entered, including the possibility of

the imposition of the consecutive sentence."

So, the mistake, I would suggest to the Court, is that the Court did not inform the defendant that the Court could impose a 1 to 15, and then a 0 to 5 consecutive for the gun enhancement.

I have given the Court at our last hearing copies of two cases which I think are particularly relevant, and the most significant, I guess, begins with Gibbons but before the Gibbons case came down, Your Honor, the caption was Warner --

THE COURT: Well, I am familiar with the law, and that is the reason, you see, we now have -- When this problem came up, we changed the statement. We call it "a statement" now that used in place of that affidavit. So I am familiar with the law. I will give you a chance to argue that if necessary. I am interested in hearing from Ms. Byrne as to her position in this regard. Okay?

MS. MOWER: I will sit down.

THE COURT: Is there anything you want to say other than what the law is?

MS. MOWER: Yeah, there is a second point, Your Honor.

THE COURT: Oh, go ahead.

MS. MOWER: With the first point, I think it is pretty clear that on the record nowhere does it talk

about the consecutive sentences with respect to the gun enhancement; but the second point, Your Honor, I think is a finer question. And that is the Court in its exchange with the defendant before you took the plea, did not advise the defendant of his rights under the constitution. And that is contained in subparagraph C of Rule 11 and those are the things like his rights against compulsory self-incrimination, right to jury trial, right to confront and cross examine the witnesses in open court. Those kinds of rights. The Court doesn't make reference to those. And my suggestion would be that in view of the fact that the legislature has seen fit to enumerate these particular rights which must be waived in open court, the Court should have made reference to them. I guess the question arises whether because those rights are talked about in the fine print of this old affidavit, whether that is sufficient to meet the requirement of this rule. And my argument would be, Your Honor, that it is not. I think that the affidavit can contain a number of things and save the Court some time in addressing some issues. But I believe that the requirements of Rule 11(e) say that you need to have some kind of specific finding about knowing, voluntary waiver of these particular rights as they are contained in these paragraphs. That is the secondary problem. The first

problem is the most serious, I think, of problems.

THE COURT: Thank you. Ms. Byrne.

MS. BYRNE: Your Honor, there are a couple of points that the State would like to raise. One of them is that under Rule 77-13-6, which is the section on allowable pleas and what may be done with them, the section added by the legislature and made operative as of July of 1989, indicates that there is a 30-day limit on the time between when the plea is entered and the time there may be a motion to withdraw it. The State has a question as to whether this is the appropriate way to raise the issue or whether the appropriate way is by Writ of Habeas Corpus. That would be our first point.

The second point, I trust the Court has a copy of the Smith case which I did bring in earlier.

THE COURT: Yes.

MS. BYRNE: Under Gibbons there is an inference that all of the information that the defendant must be advised of, he must be advised of verbally by the Court, before he enters his plea. But in Smith, and that would be at page 465, the first full paragraph, there is certainly at least an inference there this information may be furnished either in the affidavit or orally by the Court at the time of taking the plea, rather than the inference that we have in Gibbons that it must all be

orally on the record.

THE COURT: Where are you reading?

MS. BYRNE: I am reading in the first full paragraph beginning, "It indicates before us today neither defendant's affidavits regarding the plea --" It is the first full paragraph in the first column, 465. There is an inference there that you have got to have it one place or another. You have got to have it either in the affidavit or in the Court's verbal instructions, inquiries of the defendant before he enters the plea. This seems to state you have got to have it one place or the other, but not necessarily both.

It would be the State's position that given what the Court indicates in Smith, that if you have that information one place or the other, you are okay. It is a knowing and voluntary plea that would be made at that point.

The federal cases that the Court relies on seems to indicate how concerned the Court is that the Judge just talks to the attorney and the attorney answers "Yes, I have explained this to the defendant. Yes, the defendant has read it." And "Yes, the defendant wants to enter his plea." The federal cases seem to indicate that their concern is that the Judge talk to the defendant.

I would point out that in the transcript of the

hearing it seems to me that the Court had quite a bit of conversation directly with the defendant and not through the attorney. For example on page 1, at line 22, the Court asked directly of Mr. Quintana, "Have you discussed this with your attorney?" He says, "Yes."

THE COURT: Let me ask you this. Does the affidavit or the transcript indicate that the defendant was advised that his sentence could be consecutive to any sentence he was then presently serving? Let's start with that one.

MS. BYRNE: Sure. Your Honor, I believe that the Court did make that indication to the defendant and that would be on the transcript page 3, beginning at line 19. The Court has already in the previous paragraph explained that the possible sentence for the second degree felony is 1 to 15 years. Mr. Quintana indicates he understands. At line 19, the Court states, "You also understand there could be an enhancement of 0 to 5 years because you used a firearm?" It would be the State's position that that is advice of an additional sentence.

THE COURT: Well, wasn't this defendant already serving time at the State Prison?

MS. BYRNE: He was, Your Honor.

THE COURT: At the time he came before me for sentencing on a totally different crime?

MS. BYRNE: He was, Your Honor.

THE COURT: And I think one of the problems is whether or not he was advised that the sentence that I was going to hand down could be made to run consecutively and not concurrently with that term he was already serving. Isn't that one of your points?

MS. MOWER: That is one of the points, yes.

MS. BYRNE: Would the Court like me to respond to that?

THE COURT: Yes.

MS. BYRNE: The State's response to that would be there is no such requirement; that the Court always has that option to make a new offense consecutive to the old offense.

THE COURT: Does Rule 11 say I have to advise him it is consecutive?

MS. BYRNE: I don't believe it does, Your Honor, nor does the cases. Now, in the cases of Gibbons and Vasilacopulos, there is language indicating for the Court to give the full information on consecutiveness. That the Court must give that information. But what they are talking about in those two cases are crimes that the plea of guilty is entered to at that time. If someone were to plead guilty to three offenses at the time he is before the Court, if the Court intended to make these

sentences consecutive on those three offenses the defendant was pleading guilty to at that time, the Court would have to inform the defendant that there was that possibility.

THE COURT: Your point is that there is no obligation on the Court to advise a defendant at the time of sentencing that that sentence could be made to run consecutively to any other sentence he was already serving someplace?

MS. BYRNE: That would be the State's position. I do not see the requirement in 11(e) or the cases.

THE COURT: Before we leave that point, let's ask Ms. Mower. Is it your position that there was an obligation to advise him of that?

MS. MOWER: I think so, in a situation where the Court is aware that the defendant is serving a sentence.

THE COURT: Is there anyplace in the cases or the statutes that would require the Court to so indicate to a defendant?

MS. MOWER: All the statute requires and the rule requires is that the defendant know the minimum and maximum sentence to which a plea is entered. So nothing in the rule says that you have to do that. But I would suggest to the Court that there is a greater issue, and

that is the voluntariness or the knowingness of the guilty plea as far as the defendant is concerned. I think a defendant has the right to know, not under the rule, but the Boykin case and the Alford case to enter a plea knowingly and voluntarily. And I think that if the Court is aware that there is a whole other charge out there which is a current problem and the Court doesn't advise at that point "By the way, I could run this consecutive with your other charge."

THE COURT: But isn't that something that is as logical as the nose on your face? That if you have committed a crime and you are out there at prison, and then you commit another crime, any logical person would realize you don't have a right just to serve time on all of these crimes. I mean, if that were the case, why wouldn't one just feel free, whether on parole or whatever they are, to commit all the crimes they want to, they only have to serve one time and they might as well rob 50 banks as 1.

MS. MOWER: I understand the point the Court is making. The problem is that in all of the case law that talks about knowing and voluntary pleas, the emphasis is on what the defendant knows and is the defendant advised on the record. It may be perfectly logical. I think it is perfectly logical that everybody would understand that

there is a right to jury trial. I mean, why do we have to mention that again in open court? We all live in this society, but there is a requirement of, even though it is generally known. The question isn't whether it is commonly known. The question is, is it something that will affect the voluntariness of the plea on that question?

THE COURT: Okay, anything else on that, Ms. Byrne?

MS. BYRNE: Your Honor, in response to Ms. Mower's point, it seems to me that the legislature had the opportunity to include that as part of Rule 11 and did not do so and the Supreme Court of Utah had the opportunity to make that requirement in any one of these three cases that counsel and I have mentioned, but did not do so.

THE COURT: What rule is that?

MS. BYRNE: That is 77-35-11, is one of them. The other one I have mentioned is 77-13-6.

THE COURT: Well, 77-35-11 says that one of those things is "that the defendant knows the minimum and maximum sentence that may be imposed on him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences." Is this the rule that was applicable at that time of

sentencing? This isn't new. This is the same old rule, isn't it?

MS. BYRNE: It is, Your Honor. That same information is enumerated in State vs. Gibbons which is the case that caused the restructuring of the affidavits and the admonitions.

THE COURT: Shouldn't he have been advised then that his plea of guilty in this case could cause a sentence that would be consecutive to his other sentence?

MS. BYRNE: Well, Your Honor, it would be the State's position that the legislature did not make that a requirement and we --

THE COURT: What do you mean? It just says here "advise him of consecutive sentences."

MS. BYRNE: That is true, Your Honor, but it seems to me you would have to read that together with the rest of the first part of the sentence which is that the defendant knows the minimum and maximum that may be imposed upon for each offense to which a plea is entered. Not having to do with any previous pleas or sentences. I believe that applies only to the pleas entered at the time of the entry of the plea. And the cases that interpret Gibbons and Vasilacopulos and Smith, all talk about the case where the defendant enters a plea of guilty to more than one charge at that particular time.

And so that in the cases they say he must be advised that he can get consecutive sentences for those pleas entered at that time.

THE COURT: That goes without saying and in those cases were any of those defendants already serving time?

MS. BYRNE: No, Your Honor, they were not.

THE COURT: So that issue did not come up?

MS. BYRNE: No, it did not.

THE COURT: Anything else on this one point?

MS. BYRNE: Nothing beyond what I have said.

THE COURT: The second point was what, the enhancement?

MS. MOWER: The enhancement with the attempted aggravated robbery.

THE COURT: That he was not advised of the --

MS. MOWER: Consecutive. That the Court can impose consecutive sentences on that.

THE COURT: On that because of the firearm enhancement.

MS. MOWER: Right.

THE COURT: Ms. Byrne, that is the next argument.

MS. BYRNE: Okay. I would have two points to make on that, Your Honor. One is that I believe the

Court did make that clear before the plea was taken on page 3 of the transcript, beginning at line 19, when the Court says, "You also understand that there could be an enhancement of 0 to 5 years because you used a firearm?" Mr. Quintana says, "Yes." And it would be the State's position that that is advising the defendant that there could be additional time served. That is what enhancement means.

Also under State vs. Schroedder, the Court indicates that no other notice is required of the enhancement other than just indicating in the charge in the Information that a firearm was used.

THE COURT: What about that?

MS. MOWER: Your Honor, I would simply say that the Court, in spite of this language, the Court does not tell Mr. Quintana on the record that the 0 to 5 that is contained at line 19 and thereafter could be run consecutively to the 1 to 15 on the principal charge; an enhancement could possibly be an additional 0 to 5 concurrent. How is the defendant to know what --

THE COURT: How could that be an enhancement? The whole object of enhancement is if someone commits a crime, they have to pay a punishment. But if they commit that crime with a gun, then the punishment is going to be greater. That is the whole object of enhancement.

MS. MOWER: I understand that, Your Honor. However, enhancement can be either at -- You understand, we have indeterminate sentences. It can either be at the one of the 1 to 15 years, or it could be at the 15 portion. And it makes a dramatic difference if you advise somebody that it could run consecutive as opposed to adding additional time, say, making it a 2 to 16, as it may have been interpreted in this case. It is not clear. And the point is under Smith, and I think this is where the Smith case helps us, is that the Court says you have to be absolutely clear with unambiguous language what the sentence could be. And in Smith, of course, they were talking about mandatory sentences. With an enhancement, what we are talking about, the firearm enhancement, we are talking about a mandatory sentence. The problem we have is that the Court did not use unambiguous terms. It was not clearly unambiguous. It is confusing and it would have been very simple to say the word "consecutive," and unfortunately that word does not appear before the changing of plea.

MS. BYRNE: Your Honor, under the section dealing with firearm enhancement, 76-3-203, unless it is a third degree felony that is being pled to, it is not an option that it run concurrent. It has to be consecutive.

THE COURT: Well, her point, it doesn't matter

what has to be or shouldn't be. Her point is he has to have been advised.

MS. BYRNE: And my second point and the main point would be that the manner -- Enhancement, as the Court properly states, means more. If something is enhanced, that means there is more of it; not less and not at the same level. And I would submit that when the Court uses at line 19, page 3, the language, "You also understand," when the Court has already said, "for a second degree, you get 1 to 15," and then also in line 19, "you also understand if it be an enhancement of 0 to 5 because you used a firearm."

It would be the State's point that by using the language you used the word "also," that indicates additional, not the same, and the word "enhancement" means more. And I think there is no requirement that the Court state unequivocally that it must be consecutive. Merely that that information be imparted. Whether it is imparted using the word "consecutive" or not. It does not say in the cases that that particular word must be used.

Again, I think that the concern in the federal cases and I presume since the state court is also citing those same cases, the Court's concern is that the Judge have a conversation with the defendant, not just with the

defendant's attorney. And in this instance, the Court certainly did that.

MS. MOWER: And I would respond to that, Your Honor, by reminding the Court of the Vasilacopulos case. I understand it is not directly on point and, in fact, it is pre-Gibbons case. The fact of the matter was in Vasilacopulos, the Court of Appeals said, "If you are going to impose consecutive sentences, you have got to use the word 'consecutive,' otherwise it is a violation of Rule 11." You have got to do that. And unless there is something on the record where you can see that the defendant is advised that it is consecutive, you haven't advised him and he is entitled to withdraw his plea of guilty. Again, Rule 11(e) and under Gibbons, we have strict compliance. Strict compliance. That is the standard and when there is an error or the record is not clear, and the Court hasn't strictly complied, the Court must allow the defendant to withdraw his plea.

MS. BYRNE: Your Honor, may I inquire where in Vasilacopulos the Court states you must use the word "consecutive"?

MS. MOWER: Page 95, left column, middle of the page. "The trial Court clearly failed to find defendant understood the possibility of consecutive sentences. The State argues the record as a whole

affirmatively establishes defendant's full awareness of such a possibility. We disagree." And it goes on to say that the only thing contained in this particular record was a record in the affidavit which didn't apply to his circumstance.

MS. BYRNE: May I respond to that, Your Honor?

THE COURT: You may.

MS. BYRNE: Your Honor, looking at Vasilacopulos at page 95 in the section cited by counsel, it states there that the only record evidence that the Court apprised the defendant of the possibility of consecutive sentences in this case, was the Presentence Report and recommendation submitted at the sentencing hearing. That would be in this case. We have an awful lot more than that on our record in the case under consideration.

I would submit that the Court in the Vasilacopulos case, that the Court must advise the defendant that there is the possibility of consecutive sentences. It does not say that the Court must use the language: "I may sentence you to consecutive terms." That is not required under this case or any other or the statute that that word be used; and I think that looking again at the transcript on page 3, lines 19 through 22, I think the Court did advise him. And the Court further

inquires, "Do you understand that?" And Mr. Quintana, at line 23, says, "Yes." And, you know, short of giving a defendant a psychological examination after every question the Court asks, I don't know how much clearer it could be.

THE COURT: Okay. Have we covered now the points, Ms. Mower?

MS. MOWER: No. Your Honor, the final point was the rights that are specifically enumerated in Rule 11(e)3. Defendant knows he has a right against self-incrimination, to a jury trial, to confront and cross examine in open court the witnesses against him, and by entering the plea he waives all of those rights. There was no discussion on the record about that.

THE COURT: And you are saying that although the affidavit clearly states those rights and I asked him if he had reviewed that affidavit and did so with counsel, and understood all of the terms, that that is not enough?

MS. MOWER: Yeah. It is my position that because Rule 11(3) specifically talks about those rights, that the Court is required to inquire upon the record about those. I think, as I said before, an affidavit can contain a lot of language and a lot of information for a defendant, which may satisfy other requirements. But

11(e) requires something affirmative.

I would point out to the Court that especially in a case like this where there was the old affidavit, I don't think by asking a defendant, "Did you read the affidavit and did you understand it," that that meets the requirement of establishing on the record that the defendant do. You don't know. The Court can't make a finding about knowing unless the Court inquires. People every day think that they understand and say they understand, when they have no idea what they are talking about. And in order for the Court to find out, the Court has to test the knowledge of the defendant.

THE COURT: But he had standing beside him was Ms. Palacios.

MS. MOWER: True.

THE COURT: A very competent criminal lawyer, with long experience. Heard all of these questions.

MS. MOWER: True, and I have no question --

THE COURT: Would you just let me finish. I let you finish. Can I finish? Who stood beside him and heard me ask him, "Have you reviewed this with counsel and do you understand all of the terms," and so forth. And he said, "Yes." And the affidavit is very clear and lays out those in simple, concise, what I believe almost is easier to understand language than the new statement

that tries to be so all-inclusive, that he didn't understand when he signed that affidavit with his legal counsel present, with his legal counsel co-signing it; that he didn't understand that when he signed that affidavit, with his legal counsel present, with his legal counsel co-signing it, and wherein she says in there, "I certify I am the attorney for Jose Quintana, the defendant named above, and I know he has read the affidavit or I have read it to him. I have discussed it with him and believe he fully understands the meaning of the contents. He is mentally and physical competent. To the best of my knowledge and belief, the State in its representation and declaration made by the defendant in the foregoing affidavit, in all respects are accurate and true."

That he wasn't fully advised of his rights as set forth in that affidavit at the time of sentencing?

MS. MOWER: All of that is true, Your Honor. And every one of the cases that talks about the voluntariness of the guilty plea makes the statement it is not sufficient to have counsel acknowledge on the record that they think that the defendant understands; that they think they have explained it properly.

THE COURT: Well, what you are saying is the new statements that are used by all of the Judges in t

whole state and used by the thousands, that doesn't matter how good the statement is or how well it has been drafted and so forth. Every paragraph, we have to go through anyway so we might as well junk the statement?

MS. MOWER: As a matter of fact, Gibbons says that an affidavit is to be a starting point and not an ending point. The Court is required to review the information contained on the affidavit with the defendant. And further, the Copland case -- I'm sorry I didn't provide that -- affirms that notion. You need to review that with the defendant. You must test his understanding. We don't permit people simply on their say-so in this society. We don't accept somebody's representation that they understand. In school, how do you test understanding? You take a test.

THE COURT: Why do we need defense lawyers anymore? Why don't you leave them out of the picture totally if they are useless? They are worthless, if your theory is true. They are here in court to represent the rights of clients and to make sure he understands or she understands. If what you say is true, there is no need for lawyers anymore. Let's just let each individual come in before the Court and I have to make sure I have to become a lawyer for that person.

MS. MOWER: That is right.

THE COURT: That is what you are saying?

MS. MOWER: That is right. If the Utah Supreme Court places that obligation on you in Gibbons and Vasilacopulos, it is the duty of the trial judge to make sure that this is on the record and that there are specific findings, and they say it is just simply not enough. Attorneys make mistakes. Attorneys assume they communicate perfectly with their clients, and they don't.

THE COURT: Now, does your client understand that if we do allow him to withdraw his plea, all the charges are reinstated and we start from scratch, all counts?

MS. MOWER: Let me ask him. Do you understand that, Mr. Quintana, that if this plea is withdrawn, you go back to facing charges of a first degree felony, aggravated robbery, possession of a firearm by a restricted person, and habitual criminal?

MR. QUINTANA: Yes. Now -- never mind.

THE COURT: Well, go ahead if you want to talk to your lawyer, but I want you to fully understand that. I haven't made up my mind yet.

MR. QUINTANA: Can I say something?

THE COURT: You better ask your attorney if you can say something.

MS. MOWER: Your Honor, perhaps we can take a

few moments.

THE COURT: Let's take a five-minute recess. Is that enough time?

MS. MOWER: Yes.

(A brief recess was taken.)

THE COURT: Okay, anything further?

MS. MOWER: Yes, Your Honor. After talking to my client during the brief recess, my client has asked me to move the Court to request an additional form of relief. It would be his preference rather if the Court had the alternative of granting him his motion to withdraw his guilty plea and starting afresh at trial, his actual preference would be that the Court amend his sentence to reflect concurrent, where the Court feels that the Court imposed a consecutive sentence without advising him.

THE COURT: I won't do that. There is only one motion here and that is to withdraw the plea. I will either grant it or deny it. And if I deny it, then I suppose your next step would be to the Supreme Court. If I grant the motion, then the plea is withdrawn and we step back exactly to where we were just before the plea was taken. All charges again would appear, the three different counts, and then we would set a trial date and proceed. That is where we really are on this thing.

MS. MOWER: In that case, we would like a ruling on our motion.

THE COURT: Okay. Anything else?

MS. BYRNE: Yes, Your Honor. For the record, before the Court makes its judgment on this, I would like to note that in the affidavit it clearly states each of the constitutional rights that the defendant gives up, including the right to trial, to have the State present witnesses and prove each and every element, and all other constitutional rights. That is in the affidavit. I would also point out that the Court does not inquire just of counsel if the defendant understands his rights. The Court inquires of the defendant and that, I believe, is the main thrust of the federal cases, that the Court and the defendant have a colloquy. If you cannot trust what the defendant says when he says, "I do understand my rights. There are no words or phrases in the affidavit that I do not understand." Then I think we are opening the door to chaos because there would be no way that the Court could trust anything that the defendant said he understood.

The State would submit it with that.

THE COURT: Okay. Did you have anything else? You get the last word.

MS. MOWER: I would just simply point out to

the Court that when we all applied to be admitted into the bar, we felt as though we understood, after three years of law school, what the law said. The Bar Association and the Supreme Court don't take our word for it after clear study that we understand. They force us to take a test to make sure we do truly understand. I think that no less is required of the Court to make sure that a non-law educated defendant has a proper understanding of what is going to be imposed upon him. Thank you.

THE COURT: At the time the plea was taken, an affidavit was presented signed by the defendant, and that was on March 21, 1988. And in that affidavit he indicates -- it is indicated that he had read the affidavit or had it read to him by his lawyer; that he knew and understood its contents; and that he could read and understand the English language. And in that affidavit all of his constitutional rights were set forth and the defendant in this statement that he had signed, it is indicated that he was represented by Frances Palacios who explained all of his rights to him and that he understood such rights. And those rights are also set forth in that affidavit.

Doesn't that affidavit further state that he understood the punishment for this crime? Maybe 1 to 15

years, plus enhancement, 0 to 5. And that is in the affidavit.

And also part of the certificate is the certificate of the defense lawyer, Frances Palacios, where that states and I quote, "I certify that I am the attorney for Jose Quintana, the defendant above-named, and I know he has read the affidavit or that I have read it to him, and I discussed it with him, and believe he fully understands the meaning of its contents, and is mentally and physically competent. To the best of my knowledge and belief, the statements and representations and declarations made by the defendant in the foregoing affidavit, are in all respects accurate and true."

There is additional information contained in this affidavit and the document stands for itself, including a certificate of the prosecuting attorney.

Now, the Court did not rest on that affidavit alone or the face of it alone, but had a personal exchange with the defendant at the time of sentencing and the transcript of the hearing indicates that the Court asked Mr. Quintana if he had discussed this matter with his attorney and he said, yes, he had. And I asked him at that time, "Do you understand you have certain rights under the constitution, and if you plead guilty here today that you are waiving those rights?" And he

indicated, yes, he did understand that. I asked him if he had read the affidavit and the answer was yes. I asked him if he had reviewed the affidavit with his attorney and his answer was yes. I asked him if there were any words or phrases or sentences in the affidavit that he did not understand and he said no. I asked him if he was under the influence at the present time of any drugs or medication that would impair his good judgment. His answer was no and then at that point I asked him if he would then -- "Would you go ahead and sign your affidavit."

The transcript also indicates that I instructed Mr. Quintana as to the elements of the crime and then asked him -- I instructed him what the elements were and asked him if he understood those elements and his answer was yes. And I reiterated what his affidavit said, that he had attempted to take property from an employee of Magic Store and did so with the use of a gun. I asked him if that is what happened and he said yes. I asked him if that is why he was going to plea guilty to attempted aggravated robbery and he said yes. I asked him if he understood that this particular -- and these are my words: "This particular crime to which you will be pleading is a second degree felony and carries a possible sentence in the State Prison from 1 to 15

years." His answer was, "Yes, I do." And then I asked the following: "You also understand there could be an enhancement of 0 to 5 years because you used a firearm or gun at the time of the attempted aggravated robbery?" And Mr. Quintana answered, "Yes." There are some other matters that are referred to in this transcript and there was a discussion in the hearing in which the prosecutor indicated that Mr. Quintana was already at the prison and the State requested that the sentence be consecutive to his then present commitment since it was an entirely separate criminal episode of a crime, and there is a further discussion as to enhancement and so forth.

With that in mind, I believe that he waived the waiting period for being already in the prison. He waived the mandatory two-day waiting period for sentencing, and requested immediate sentencing. And therefore, then there was an exchange as to what the sentence would be and his lawyer made an argument and gave some background information, and with that exchange there was the usual discussion that takes place at the time of sentencing and he was sentenced to consecutive terms.

The Court found at that time and so stated in the transcript that based upon all of the foregoing in the affidavit, that the defendant had made a voluntary

and knowledgeable plea and the issues before the Court now simply go to whether or not he was advised orally or advised sufficiently.

The Court finds in addition to the constitutional rights, that the affidavit, in addition to the exchange that took place between the Judge and the defendant, in the presence of his attorney, and the certificate of the attorney, that he understood the contents of the affidavit and that he had read it or she had read it to him and they had discussed it. And in addition to the defendant having said he had read and reviewed that affidavit, and also had discussed it with his attorney, and that in that affidavit the affidavit is clear enough with all of this exchange that he fully and truly understood the rights that he had and that the rights that he was waiving, the constitutional rights at the time the plea was taken.

As to the enhancement, the affidavit clearly says that the defendant understood the punishment may be 1 to 15 years, plus enhancement, 0 to 5. And there was a discussion on the record of enhancement and the Judge specifically indicated during the hearing, asked the defendant if he understood that there could be an enhancement of 0 to 5 years. And the very word "enhancement" indicates something in addition to. And

the way the affidavit is worded, and that exchange, the Court would find he understood that.

It leaves the third point. The third point being that Mr. Quintana at the time of sentencing in this case was already incarcerated in the Utah State Prison for a crime totally unrelated to this, I believe. I don't know. I can't say that with authority. I assume totally unrelated to this, but he was already an inmate there. And I would have to review -- We would have to go back to the Presentence Report because my memory doesn't serve me whether or not the crime in this case was while he was out on parole, which my best memory is that it was, but I could be mistaken. Or whether this crime or that crime was committed separately and he just happened to end up at prison before this one got tried. My memory serves me that he was on parole from the State Prison at the time he committed this crime and that parole had been revoked and he returned to the State Prison and therefore was now serving that time for that original crime when this one came up for sentencing. If I am in error, I would stand corrected if someone here knows and could direct me in that regard; but that is my best memory.

MS. BYRNE: I have that information.

THE COURT: Am I accurate?

MS. BYRNE: Your Honor, I have a certified copy

of a previous conviction that was had before Judge Rokich on August 20, 1985, in which the defendant was also represented by counsel. And those affidavits would indicate that at the time of the commission of the offense and the discussion here, he was on parole from the Utah State Prison for the felonies which he either pled or was convicted by Judge Rokich. If the Court would like, I could present the document to be made a part of the record.

THE COURT: Was he on parole when he was sentenced, or do you know?

MS. BYRNE: That is the indication I have, Your Honor.

THE COURT: But anyway, it is clear he was at the State Prison when it was time for sentencing on this case.

His attorney during the hearing says -- states that -- asks the Court because of his history and problems if -- she says, "If the Court intends to run this consecutively, we would ask the Court to also consider to only sentence him on the one year for the enhancement." And she asked Mr. Quintana then, "Do you have anything to add?" And he said: "You have said it all."

I asked him if he was on parole at the time of

this crime and Mr. Quintana said yes. So he was on parole at the time of this crime.

I did not advise him, according to this transcript, that the sentence could be consecutive with the crime for which he was already serving in the State Prison and the affidavit does not. The Vasilacopulos case and the other cases deal with defendants with multiple counts and the necessity of the Court to advise the defendant when one makes a plea to multiple counts that each count carries a sentence and each one can be consecutive, one with another. I do not know of a case in Utah that deals with the issue of where one has been out on parole, commits a crime and, in fact, his parole is revoked and he is back in prison. And then he goes to trial for the crime he committed while on parole or makes a plea, whatever the case may be, whether he has to be advised that that sentence would be consecutive to the one already being served in the State Prison.

I am finding that such is not necessary because it should go without saying that if one is in prison, is put out on parole and commits a crime while on parole, and his parole is revoked and he is back serving his original time, that any punishments for crimes committed while out on parole are going to be added to whatever he is serving while in the prison. I don't think that a

defendant in such a circumstance needs to be advised of that. It would be illogical and almost ludicrous to think that one, while on parole could commit crimes without any additional punishment. Otherwise, parolees all the time they would have nothing to risk except just the original time they were serving and there would be no real inducement to go straight on the outside.

I am making a finding that -- holding, I guess, not a finding. I am really making a holding then that in this type of a situation, there is no necessity to advise the defendant that his new crime is going to have a punishment that could be consecutive to the time already being spent in the prison and for the reasons I have already stated. I think I have covered all three points. Have I?

MS. MOWER: Yes, you have, Your Honor.

THE COURT: And that being the case, I will deny the defendant's Motion to Withdraw his Plea.

MS. MOWER: Your Honor, we need an additional finding if the Court can help us. The Court has made reference in its ruling today to information which came after the taking of the plea. For example, in this case, the Court took his plea first and then there was a sentencing hearing after the taking of the plea. The Court has referred to --

THE COURT: Well, I don't think that is necessary for the holding that I have made. I think I have made it very clear what my holding is, regardless of what was said at sentencing. The only reason it just may have some added impact, if you want to say that in this case, is the fact that the plea was taken and sentencing done all the same time in the same hearing with his attorney present in which therefore at that very same time a discussion was made concerning hoped the sentence wouldn't be consecutive or not. It may have just happened two or three minutes after the plea was taken. But it is all taken there all basically there at the same time, which I don't think it is necessary, but would seem to indicate that it was pretty clear in the mind of the defendant and his attorney that that certainly was a possibility, or it wouldn't have been brought up at that moment. Okay, that being the case, you may prepare the findings and my order.

MS. BYRNE: Thank you, Your Honor. I will do that. While we are still on the record, I would note that as I believe I pointed out in my argument previously, that there is also an advice of the possible enhancement on firearm before the defendant enters his plea and that would be on the transcript at page 3, lines 19 to 22.

THE COURT: I thought I referred to that.

MS. BYRNE: You may well have, Your Honor, but counsel asked about it only happening subsequent to the taking of the plea, inclined me to mention that one more time.

THE COURT: I think she had reference to the consecutive.

MS. MOWER: The first mentioning of the word "consecutively" was post taking.

MS. BYRNE: Okay, just as long as we are talking about that word.

THE COURT: I did say the record does not indicate that in the affidavit or the transcript itself, that before the plea he was advised that this sentence could be consecutive to the one he is already serving. That is the reason I went to such great lengths to give my reasoning why I don't think that was necessary. The other argument as to enhancement, that clearly -- the affidavit not only says 1 to 15 years, plus enhancement, but there was also an exchange on the record. So that one is clear that he knew of that. But as for the other, that is the one issue that I really had to rule on and state the reasoning for that. 1 And, Ms. Byrne, if you would prepare the appropriate -- make the findings as I have basically said them so there is a record on that.

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the Official Court Reporters of the Third District Court of the State of Utah.

That on Friday, February 2, 1990, I reported the testimony and proceedings, to the best of my ability on said date in the above-entitled matter, presided over by the Honorable Leonard H. Russon in the Third District Court of Salt Lake County, State of Utah; and that the foregoing pages, numbered from 21 to 59, inclusive, contain a full, true and correct account of said proceedings of Quintana's Motion to Withdraw Plea Continued to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this 23rd day of October, 1990.

Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No. 00074-1801-8